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ICTR-01-75-AR11bis

07-02-2011

(322A — 319A)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Andrézia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

Date: 6 February 2012

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JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-2001-75-AR11bis

**DEFENCE REPLY TO OPPOSITION TO DEFENCE EXTREMELY URGENT
MOTION FOR REVIEW OR RECONSIDERATION OF THE DECISION OF 16
DECEMBER 2011 ON UWINKINDI'S APPEAL AGAINST THE REFERRAL OF HIS
CASE TO RWANDA AND MOTION TO VACATE INTERIM ORDER**

Office of the Prosecutor

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For the Defence

Claver Sindayigaya
Iain Edwards
Bettina Spilker

I. Procedural background

1. The Defence's original motion for review or reconsideration was premised on the danger that the Accused would be transferred to Rwanda before any effective monitoring and reporting mechanism was in place.

2. It will be noted that the Prosecutor's position regarding the Registrar's Submissions¹ was that referral of the Accused to Rwanda should not be postponed to accommodate the Registrar's difficulties in arranging the administrative framework necessary to support the Tribunal's monitoring conditions. In other words, the Prosecutor's position was that, whether there was a monitoring programme actually in place or not, the Accused could properly be transferred to Rwanda. As far as the Prosecutor was concerned it was not his fault that no administrative framework was in place – it was the Registrar's problem, but that should not hold up transfer.

3. In contrast, the Defence's position was, and remains, a pragmatic one. It does not matter why the monitoring mechanism is not yet in place. The reality of the situation is that there is no such mechanism in place yet. While this situation subsists, the Accused cannot be transferred to Rwanda.

4. The gravamen of the Acting President's Decision is that, since "discussions with the ACHPR regarding the modalities of the monitoring and securing of the necessary funding should have been ongoing" since 28 June 2011, any further stay in the transfer is not warranted "at this time". Therefore, the Acting President has made it clear that the existence of an effective monitoring and reporting mechanism is not to be taken as a *sine qua non* of transfer. It is this fact which makes Uwinkindi's transfer to Rwanda imminent since there is *nothing which would prevent the Registrar from arranging and effecting transfer before the 30-day deadline expires.*

5. It remains the Defence's position that neither the Trial Chamber nor the Appeals Chamber ever envisaged or intended that the Accused might be transferred to Rwanda without there being in place before his transfer the added guarantee of a monitoring mechanism.

¹ *Prosecutor v Uwinkindi*, ICTR-2001-75-AR11bis, Registrar's Submissions Regarding the Transfer of the Accused to the Custody of the Republic of Rwanda, 16 January 2012; *Prosecutor v Uwinkindi*, ICTR-2001-75-AR11bis, Prosecutor's Response to Registrar's Submissions Regarding the Transfer of the Accused to the Custody of the Republic of Rwanda.

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However, as matters have evolved, the Accused is faced with the very real danger of precisely this eventuality occurring.

II. The Appeals Chamber's inherent jurisdiction to be seized of the Defence's Motion

6. It is again acknowledged that the Defence's Motion is without precedent. But that is not to say that the Appeals Chamber has no jurisdiction to consider and pronounce upon the Motion. Rule 11bis proceedings are strictly speaking interlocutory in nature. However, it is submitted that referral proceedings are evidently distinguishable from all other interlocutory proceedings before the Tribunal in cases where the Tribunal itself retains full jurisdiction. In the instant case, notwithstanding a residual jurisdiction to order revocation (revocation, moreover, being characterised by the Referral Chamber as a "remedy of last resort" and therefore highly unlikely to ever be ordered²) there is a far greater element of finality to the Appeals Chamber's decision than is to be found in the context of any other kind of interlocutory proceedings.

7. Further, as the Prosecutor accepts, the Appeals Chamber "may reconsider a previous decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice."

8. The Defence submits that the Prosecutor's reasoning in his opposition motion of 30 January 2012 is erroneous. If, as the Defence has established, there is a real risk that the Accused will be transferred to Rwanda without any reporting or monitoring mechanism being in place, this would not only result in a situation unanticipated and unintended by the Tribunal, but could well result in serious injustices being caused to the Accused, the very same injustices independent monitors would deter and discourage by the mere fact of their presence in Rwanda, or which they will be mandated to record and report upon.

9. The Prosecutor allows himself to engage in pure speculation when, at para. 16 of his opposition motion, he describes the foreseeability of additional orders issued by the President, or how the Defence would or might respond to these. Such a "floodgates" argument is unwarranted in the present case.

² *Prosecutor v Uwinkindi*, ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, para. 217.

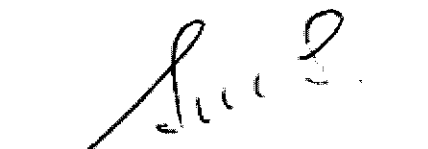
III. The assumption that the Tribunal's orders will not be implemented

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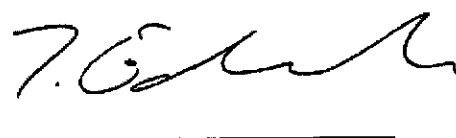
10. For the reasons set out above at para. 4, the result of the Acting President's Decision is that no obstacles are in place to prevent the Accused's immediate physical transfer to Rwanda. It is immaterial whether or not a monitoring mechanism is in place or not. The Registrar may wait until the very last day of the 30-day limit before transferring Uwinkindi, or he could arrange for his transfer tomorrow. There are, in fact, no judicial orders to the effect that the existence of a monitoring mechanism is a condition precedent to transfer.

11. Following this reasoning, even if the Accused is not transferred before 22 February 2012, it is clear that as matters stand, there would be nothing to prevent the Accused being transferred even if no arrangements for the monitoring mechanism have been finalised. The Prosecutor fails to address any submissions to this difficulty of principle, preferring to proceed on the assumptions that the Registrar will not transfer the Accused before the very final moment of the deadline and that the necessary arrangements will be in place by that date. The Acting President's Decision provides no foundation upon which these assumptions can reasonably be made.

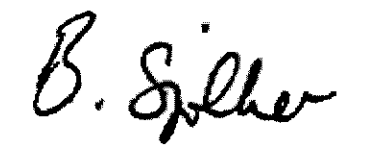
Respectfully submitted,



Claver Sindyigaya, Lead Counsel



Iain Edwards



Bettina Spilker



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